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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 585

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JAMES M. BORUM, RESPONDENT.

PETITIONER'S REPLY BRIEF.

On final hearing

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INDEX.

	Page
Respondent's fraud	2
The conflict with public policy	3
The importance of age misrepresentation as nullifying:	5
(1) the qualifying certificate of the company surgeon	5
(2) the regulation for retirement at 65	6
(3) the regulation against entering after 45	6
(4) the routine whereby an older man obtains a safer position	7
The prevalence of such misrepresentation	9
The connection between respondent's age and his accident	10
The thirty-day rule	10
Section 5 of the Act	12
The suggestion that the Rock case should be overruled	13
Conclusion	14

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We reply to the following contentions in respondent's brief:

1. That respondent committed no fraud in misrepresenting his age.

2. That fraud in obtaining employment does not preclude a recovery for injuries, either at common law or under Workmen's Compensation Acts.

3. That misrepresentation of age is unimportant.

4. That misrepresentation of age is a common thing.

5. That there was no connection between respondent's age and his accident.

6. That respondent was absolved by the thirty day rule.

7. That the recovery is authorized by Section V of the Act.

8. That the Rock case should be overruled.

1.

THE CLAIM THAT RESPONDENT COMMITTED NO FRAUD.

Respondent's brief contradicts the arbitrators' findings of fact in asserting that the record shows his innocence of any fraudulent deception.

The claim is based on rehearsing his own testimony that some of petitioner's employes knew or suspected his true age and suppressing not only their denials but the Company Surgeon's *undisputed* testimony that he qualified respondent in reliance on the age he gave, without any reason to doubt its truth (R. 78, 82).

The insufficiency of respondent's testimony in that respect was settled by the arbitrators' ninth finding of fact (R. 133):

> "9. That the evidence relied on by the plaintiff as to the knowledge possessed by the defendant of plaintiff's age at the time plaintiff sought employment was so unsatisfactory as bearing upon the question of estoppel, that the arbitrators have been unable to make any finding thereon."

To escape from that finding respondent's brief misrepresents it as a finding against *petitioner*, baldly asserting that it is a finding that "the *only defense* of the carrier is unsatisfactory" (p. 17).

The brief squarely asserts that "No tribunal found any fraud in this case" (p. 33). We briefly summarize the find-

ings that he *was* guilty of fraud. The arbitrators found that being 49 he gave his age in his application as 38 "knowing such statement to be untrue" and "for the purpose of securing employment in disregard of the rule" which he "understood that the defendant had" (R. 132, 138). That he also made a "knowingly false statement of his age" to the Company Surgeon which was "relied upon" by the latter in "issuing a certificate of physical fitness required by the defendant of employes entering its train service" (R. 138). That the foregoing formed, in part, the "basis" on which petitioner gave him employment (R. 138).

Those findings were affirmed by both the District Court and the Supreme Court (R. 146, 172). The District Court referred *eo nomine* to respondent's fraud, in declaring that there were no circumstances "connected with his fraud" which would render a recovery abhorrent to public policy (R. 149). The Supreme Court did likewise in declaring that "His only wrong or fraud was in misrepresenting his age to get a job" (R. 172).

2.

The Argument That Respondent's Fraud Does Not Preclude His Recovery.

In referring to decisions at common law and under Workmen's Compensation Acts that fraud in securing employment does not prevent a recovery for wages earned or injuries sustained in such employment, the brief overlooks the distinction established in *M. St. P. & S. S. M. Ry. Co. vs. Rock*, 279 U. S. 410, that a recovery under the Federal Employers' Liability Act should be denied where the fraud was of such a character as to render it "*abhorrent to public policy.*"

The same abhorrence to public policy which existed in that

case is found in the present case. Rock, being disqualified from entering the switching service by his *physical condition*, fraudulently obtained a qualifying certificate from the Company Surgeon. The present respondent, being disqualified by his *age*, fraudulently obtained a qualifying certificate from the Company Surgeon. If it was against public policy for Rock to recover under this Act because he had obtained his employment in that manner, it is likewise against public policy in this case.

The public interest of promoting the safety and efficiency of interstate commerce by enforcing such requirements for entering the service is not affected by the differences emphasized in respondent's brief between the subterfuges which he and Rock employed to circumvent the Company Surgeon.

The attempt in the brief (p. 27) to distinguish the decision against Rock as based on a mistake as to his identity not present in this case is clearly untenable. The view that Rock's contract of employment was invalid on that ground was submitted to this Court in the railroad company's petition for certiorari and in its brief after the writ was granted. At the oral hearing Mr. Justice Holmes intimated that there was no such mistake of identity as would invalidate the contract, because the Company knew it was employing the man who appeared before the employing officer, even though he had altered his name and procured his qualifying certificate through another individual. Chief Justice Taft then suggested that counsel should not continue to argue that there was a mistake of identity. When the opinion of the Court was rendered through Mr. Justice Butler it was based entirely on the ground that Rock's employment had been obtained through *fraud*.

3.

ALLEGED UNIMPORTANCE OF AGE MISREPRESENTATION.

The record does not justify the assertion in respondent's brief (p. 26) that the employing clerk testified that "they paid little attention to age." He testified that he observed "absolutely" the regulation against allowing men to enter after 45; that he accepted a man's own statement as to his age unless there was a question in his mind as to whether the man was understating it; that he would question the man "very closely" if he looked older and he would not "get by"; and that if the witness knowingly gave a man over 45 temporary employment during rush times he always laid the application to one side for rejection within thirty days to prevent the man from becoming a regular employe (R. 103, 113, 121, 127). The Company Surgeon testified that he would make a notation on his report of an applicant's physical examination if he appeared to be older than 45; and that there was no indication that respondent was older than the age he gave (R. 78, 79).

Nevertheless, respondent's brief (p. 25) argues that the misrepresentation of age was *not important*. We reply that it was *highly* important as nullifying the obtaining of a qualifying certificate from the Company Surgeon; the regulation for retirement at the age of 65; the rule against entering after 45; and the routine whereby an older man obtains a safer position.

(1) *Nullifying the qualifying certificate of the Company Surgeon.*

Any substantial misrepresentation by an applicant to the Company Surgeon, which procures from him a qualifying

certificate that he would not otherwise furnish, nullifies *pro tanto* the requirement of such a certificate for entering the service, breaking down the protection thus afforded to the safety and efficiency of interstate commerce. That was the gist of Rock's offense.

(2) *Nullifying the regulation for retirement at 65.*

An understatement of a man's age in his application certificate tends to keep him in service after the age fixed for retirement. Existing regulations require a man to be retired at 65, unless he passes a physical examination each year thereafter showing that it is safe to retain him in service, whereby retirement may be postponed to a maximum age of 70 (R. 79, 106, 111, 133, 134). It is definitely unsafe for himself and others for a man to remain in this service after 65 without such further examinations, because of the probability of dangerous physical defects then developing within him (R. 106). In enforcing retirement at 65 the Company is guided solely by the age a man gave in his application (R. 111). For instance, this respondent, having understated his age by 11 years in his application, could have remained in service until he reached the advanced age of 76, before the Company's records would show him to be 65, *as he admitted and seemingly contemplated* (R. 55, 111).

(3) *Nullifying the regulation against entering after 45.*

Any substantial evasion of the regulation against entering the service after 45 is detrimental as tending to defeat its purpose. Its purpose is "to promote safety and efficiency in railway operations," as the arbitrators expressly found (R. 138). That finding was supported by ample evidence that the switching service requires great physical agility and

alertness to avoid its exceptional hazards; and that men over middle age are usually deficient in those respects in comparison with younger men, *as respondent himself expressly admitted* (R. 56, 57, 75, 76, 105, 106).

Respondent's brief suggests that petitioner is precluded from asserting that it is important to keep men from *entering* the service after 45 because of allowing those who entered under 45 to *remain* in the service after they pass that age. But there is no inconsistency.

There is, of course, in the switching service a limited number of positions which are safer than other positions. For instance, as supervising foremen rather than as more active workers, or in day work rather than night work, or in switching to and from industry tracks rather than in classification yards. Those safer positions are available for men who entered the service under 45 and remain after that age, as they become less qualified for the more active and dangerous work. In view of the limited number of safer positions which are available for them there is no inconsistency in petitioner's attitude that a limited number and no more of men over 45 can be safely retained in service.

(4) *Nullifying the routine whereby an older man obtains a safer position.*

The routine is based on the well-known "seniority" rule, which the railroads are bound by agreement with the Brotherhoods to follow. When a given position becomes vacant, the man who stands next on the "seniority" list has a right to select it for himself. On entering or re-entering the service a man's name is placed at the bottom of that list and advances as those ahead of him die or retire. Thus his right to select a more attractive position depends on the

number of years he has been in service. Consequently, men past 45 who entered under 45 have a "seniority" standing through which they naturally fit themselves into the safer and more attractive positions; but if they had entered after 45 they would stand lower on the list and have to fill less desirable and more dangerous positions.

Respondent's own case is a good illustration. Having come into the service at the age of 49, he was only seven years from the bottom of the seniority list when injured at the age of 56. Normally, when a switchman reaches 56 he stands at least 11 years from the bottom of the list, having entered the service when not over 45. Respondent's standing on the list being thus abnormally low for his real age, he was still working at 56 as a helper, on a night shift, in a classification yard, climbing up and down cars to set brakes and throw switches (R. 12, 13, 18, 19, 20). That highly dangerous position would have been filled by a younger man, presumably more alert and more likely to escape from the emergency in which respondent was injured, if petitioner's efforts to keep men from entering the service when over 45 had not been frustrated by respondent's fraud.

The detriments to the safety and efficiency of interstate commerce thus resulting from misrepresentation of age are not eliminated by the claim emphasized in respondent's brief (p. 25) that he personally "was physically fit." If one man can practice such misrepresentation with impunity others also may do so and will be encouraged in that direction, thus undermining the protection for interstate commerce afforded by the above regulations.

4.

The Prevalence of Age Misrepresentation.

The brief suggests that since the employing clerk admittedly knows that applicants frequently misrepresent their ages petitioner assumed the risk of respondent doing so, in employing him on the basis of the age he gave in his certificate. But, even with that knowledge, railroad companies should not be charged with the responsibility of obtaining more reliable proof of an applicant's age than his own certificate.

An investigation of the applicant's own previous statements to other employers cannot be relied upon. For instance, respondent admitted that he had with his previous employers consistently adhered to the false date of birth which he gave petitioner (R. 57-63). Birth certificates are frequently impossible to secure, particularly for men born in foreign countries, or in places in this country where official birth records were not kept at the time. In the present case, for instance, when respondent's statement after his accident suggested his previous falsification of his age, in order to ascertain the truth petitioner had to employ lawyers in Illinois who obtained access to the record of his birth in the family Bible (R. 130).

From the standpoint of the public interest, the dangerous influx into railroad service of men over the proper age for entrance will be better restrained by not absolving them from responsibility for falsifying their ages, than by so absolving them on the theory that the railroad companies should be able to discover their true ages from other sources.

5.

THE ALLEGED LACK OF CONNECTION BETWEEN RESPONDENT'S AGE AND HIS ACCIDENT.

It is not established that there was no connection between respondent's age and his injury. It is possible, perhaps probable, that but for the slowing down of his sensory perceptions and physical reactions because of his age he might have heard the locomotive and jumped away in time to escape.

But, even if it be assumed that his age had nothing to do with his accident, that is of no more importance than was the fact that Rock's "physical condition was not a cause of his injuries." 279 U. S. 415.

Whatever the immediate cause of the accident, the man's own fraud procured his employment and thus brought on his disaster. As was said in the Rock case (279 U. S. 415)

> "The misrepresentation and injury may not be regarded as unrelated contemporary facts."

However, the more important question is not the cause of the particular accident, but the general effect of condoning the fraud.

6.

THE THIRTY DAY RULE.

The rule is as follows (R. 133):

> "Applications for employment in yard service not rejected in thirty days will be considered accepted."

The plain meaning of that language is that non-rejection of an application for thirty days is tantamount to acceptance, without further notice. The unambiguous language

does not call for interpretation, or for reading into it any meaning which is *unexpressed.*

But respondent's brief would read into the rule the unexpressed meaning that an employe may not be *discharged,* after thirty days, for fraud in obtaining his employment. That interpretation was adopted by the arbitrators (R. 133). The District Court expressly declined to adopt it (R. 147). The Minnesota Supreme Court seemed to accept it (R. 173, 185). Whether it should be adopted is a question of law for the Court.

Throughout this entire proceeding there has never been a suggestion that any such intention was expressed in the rule, entertained by those who promulgated it, or ever enforced in actual practice. The sole and only excuse advanced for recognizing it has been that it was assented to by two lay employes in petitioner's Employment Department, who expressed their *opinion* on cross examination that it was a proper interpretation (R. 94, 95, 117, 183).

Apart from the complete absence of any sound argument for reading that meaning into the rule, there is a valid reason against doing so.

An agreement by petitioner to condone, after thirty days, an employe's fraud in frustrating reasonable entrance requirements would amount to an abandonment to that extent of its duty to the public. Public policy demands that carriers enforce regulations of that character in order to increase the safety and efficiency of interstate commerce, as was held in the Rock case. There the Court pertinently referred to the principle that a carrier may not repudiate its "essential duties" to the public. No such repudiation should be read into its agreement gratuitously, by a forced and unnatural interpretation.

But even if it were proper to interpret the rule as an

agreement not to discharge respondent for his fraud, that would not be the same as an agreement that he might maintain such an action as the present. The question here is not whether he could have been discharged, but whether he can recover under the Federal Employers' Liability Act. The obvious hiatus between the two questions was ignored by the arbitrators, the Supreme Court of Minnesota, and in respondent's brief.

7.

THE ARGUMENT BASED ON SECTION V OF THE ACT.

Respondent's brief (pp. 20-23) argues that the 45 year limit for entrance is void under Section V of the Act, to the extent that it enables petitioner to escape "a liability created by this Act." The argument is based on the tacit assumption that the Act *does* create a liability in favor of a man in respondent's position.

Petitioner contends that respondent *never became* one of those legitimate railroad employes in whose favor the Act creates liability, because of the fraud through which he obtained employment and the conflict with public policy. If that contention be sustained petitioner is not liable to respondent regardless of Section V, for that section merely preserves against nullification such liability as the Act creates.

There is a manifest distinction between entrance regulations which would keep a man from becoming a legitimate employe, and regulations which would prevent one who became such from enforcing rights incidental to that status. Section V does not apply to the former but only to the latter.

Assume, as respondent's brief contends, that Section V gave him the right to recover despite his evasion of the en-

trance regulations. By the same token it would have the same effect in the case of such an evasion as occurred in the Rock case. Thus respondent's argument suggests, by necessary implication, that the decision against Rock should not be adhered to.

8.

The Suggestion That the Rock Case Should Be Overruled.

The attempted *distinctions* from the Rock case being insubstantial, respondent's brief culminates in the suggestion that it should be *overruled*. The brief makes an express disclaimer of such suggestion, but insinuates it nevertheless by asserting that "many lawyers feel" that the case was incorrectly decided; and by quoting from an article in the *Harvard Law Review* criticising it as unsound, inquiring whether it is "too much to hope" that it may be overruled, and proposing that, if not overruled, Congress should "overturn it by express and unmistakable provision" (Br. 27, 28, 29).

The reason advanced for not following the Rock case, either by distinguishing or overruling it, is the alleged harshness of applying its principle to cases like the present.

As for respondent himself, the harshness has been ameliorated by the fact that petitioner has paid him, regardless of legal liability, one-half of the amount considered acceptable in view of his injuries.

Of course, this case will be a precedent for other men in railroad service who may have entered, and still remain, on the false basis of representing themselves to be younger than their true ages. The brief suggests that it would be harsh to bar these men and their dependents from recovering for injuries sustained by them in their employment.

An easy remedy is apparent. These men are represented by Brotherhood officers able to initiate reasonable measures in their behalf. The following arrangement could no doubt be consummated by agreement with the railroad companies, because it would be to the companies' advantage. Notice might be given to all railroad employes that any of them who have previously obtained employment by falsifying their ages will be reinstated on the basis of their correct ages, if they will come forward and disclose their true ages. That would both protect them against the suggested harshness and minimize the dangers incident to their remaining in service on the false footing of younger men.

CONCLUSION.

The probability that a clearing up of the present situation will result from a decision against this respondent is, from the broad standpoint of public policy, a strong argument for such a decision. To an unknown extent the existing and prospective presence in railroad service of older men on a pretended basis of being younger than they are is a menace to the safety and efficiency of interstate commerce; and a decision which would tend to eliminate that menace would seem to be clearly in the public interest.

It is respectfully submitted that the judgment for respondent should be reversed.

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April, 1932.

ADDENDUM

Dawson v. Tex. & P. Ry. Co., 45 (2d) S.W. 367.

Held, following the Rock case, that a switchman who suppressed the fact of his previous employment by another railroad company and injury could not recover under the Federal Employer's Liability Act.